A **SUPERINTENDENT OF LANDS AND SURVEYS, KUCHING DIVISION & ORS**

v.

B **KUCHING WATERFRONT DEVELOPMENT SDN BHD**

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
RAMLY ALI JCA
AZHAR MA'AH JCA
C [CIVIL APPEAL NO: Q-01-197-2008]
7 AUGUST 2009

CIVIL PROCEDURE: *Appeal - Appeal to Court of Appeal - Appeal against High Court's decision to grant interim injunction - Duty of Court*
D *of Appeal on appeal - Appellate interference, when warranted*

CIVIL PROCEDURE: *Declaration - Discretion to grant declaration - Nature of discretion - Whether open to court to make consequential orders*

CIVIL PROCEDURE: *Injunction - Interim injunction - Prayer for*
E *interim injunctive relief not pleaded in writ - Application for interim injunction made by way of originating summons - Whether mandatory for such prayer to be pleaded in the writ - Whether application by way of originating summons properly made - Rules of the High Court 1980, O. 29*

F

CIVIL PROCEDURE: *Injunction - Injunction restraining government - Whether permanent and interim injunctions permitted against government - Whether permanent and interim injunctions permitted against government departments and/or servants - Whether injunctions*
G *against government departments and/or servants are in substance and effect injunctions against the government - Rationale behind prohibitions on injunctions against government - Government Proceedings Act, s. 29(1)(a),(b) - Specific Relief Act, s. 54*

H ***CIVIL PROCEDURE:*** *Injunction - Balance of convenience - Whether public interest to be taken into consideration when assessing the balance of convenience - Damages quantifiable - Whether proper case for injunction*

The respondent's land, valued at RM14m was re-entered by the second appellant who also caused a memorial of such re-entry to
I be made on the land register. The land was subsequently forfeited and reverted to the fourth appellant – the State Government. The respondent thus filed a writ in the High Court for declaratory

relief, *inter alia* declarations that the second appellant's re-entry was unlawful, invalid, null and void and that the plaintiff was entitled as against the fourth appellant to the land and/or to the possession thereof. The respondent also filed an *inter partes* application for an interim injunction, pending disposal of the action, to restrain the third and fourth appellants from dealing with the land and to restrain the first and second appellants from registering any instrument of dealing relating to the land. The High Court granted the injunction and the appellants appealed to the Court of Appeal. The appellant submitted that the High Court had erred since: (i) the respondent had not sought injunctive relied in its writ; (ii) ss. 2 of the Government Proceedings Act 1956 (GPA) and 54 of the Specific Relief Act 1950 (SRA) respectively barred injunctions against the government and government departments; (iii) the balance of convenience did not favour the granting of the injunction; and (iv) damages were adequate to compensate the respondent.

Held (allowing the appeal)
Per Suriyadi Halim Omar JCA delivering the judgment of the court:

(1) The task of the Court of Appeal was merely to review the decision of the High Court judge and conclude whether he had correctly applied all the right principles when ordering the *interim* injunction. It was not open to the Court of Appeal to substitute the High Court's decision with its (Court of Appeal's) own decision, on the basis that the Court of Appeal would have arrived at a different finding if it was in the position of the High Court. If the High Court judge had committed an error in law, misconceived the facts, failed to give sufficient weight to relevant matters, took into account irrelevant matters or the decision would result in injustice, the Court of Appeal was then bound to set aside the High Court's order. *Vijayalakshmi Devi d/o Nachatiram v. Dr. Mahadevan* (refd); *S & F International Ltd. v. Trans-con Engineering Sdn. Bhd.* (foll). (para 2)

(2) Subject to certain statutory restrictions, a court may issue declaratory decrees pertaining to the status or right of any person entitled to any legal character, or to any right as to any property. He is entitled to institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make a

declaration that he is so entitled. Such a declaratory order would be binding on the relevant parties to the suit. In the instant case, it was open to the High Court judge to make consequential orders, though not an order of repossession by the respondent. *Lim Cho Hock v. Government of Perak & Ors.* (foll). (paras 7 & 8)

(3) Although the respondent had not pleaded *interim* injunctive relief in its writ, the respondent's application for injunction by way of originating summons was co-extensive to its writ. Order 29 of the RHC 1980 was wide enough to cover the situation, notwithstanding the writ was silent as to the prayer for injunction. (paras 9 & 10)

(4) Notwithstanding the High Court's discretion to grant an injunction, s. 29 of the GPA does not permit the granting of any injunction against the government. Likewise, s. 54 of the SRA prohibits the grant of an injunction against any Malaysian government department. The words of s. 29(1)(a) of the GPA are quite clear and there is no reason to depart from it. Under s. 29(1)(b) of the GPA, although the court is prohibited from making an order for the recovery of land or the delivery of property in proceedings against the government for the recovery of land or other property, the court may make an order declaring that a plaintiff be entitled to such land or property. Thus an aggrieved plaintiff, though unable to recover the land is not deprived of certain entitlement, such as compensation. In the instant case, in view of the statutory prohibitions, there was no prospect of the respondent recovering possession of the land from the government. Thus, there was no reason why an injunction should have been granted at all. *Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors* (not foll); *Tengku Haji Jaafar & Anor v. Government Of The State Of Pahang* (refd); *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* (dist); *Lim Kit Siang v. United Engineers (M) Bhd & Ors* (refd); *Pemungut Hasil Tanah Daerah Barat Daya, Penang v. Kam Gin Paik & Ors* (foll); *Evergreen Frontier (M) Sdn Bhd v. The Director of Lands and Surveys (Sabah) & Anor* (foll); *Bato Bagi & Ors v. Government Of The State of Sarawak* (foll). (paras 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 & 25)

(5) Section 54 of the SRA is meant only for permanent injunctions. In the instant case, although the respondent contended that a permanent injunction could be obtained against a government servant, it failed to identify the relevant provision. It was also unlikely that the respondent would have obtained a permanent injunction since it did not apply for one against government servants. Further, even if it did, there was only a slim likelihood given the applicable law. Since the respondent could not obtain a permanent injunction against government servants, it could not therefore obtain an *interim* injunction against them. (paras 26 & 27)

(6) In the instant case, apart from the statutory prohibition in s. 54 of the SRA, there was no reasonable excuse why the government departments involved ought to be prevented from carrying out their daily responsibilities. Further, although injunctions had been sought by the respondent against government departments and government servants, in substance and effect the injunctions were actually against the government, contrary to s. 29(2) of the SRA. (para 28)

(7) In assessing the balance of convenience in injunction applications, the court may take into consideration the public interest. In the instant case, the government departments could not take lightly that the respondent's excavated land posed a threat to the public. Allowing government departments and/or servants to carry out their duties to the public without fear of any impediment constitutes the rationale behind the prohibitive provisions in the GPA and SRA. *Smith v. Inner London Education Authority* (refd); *Tenaga Nasional Berhad v. Dolomite Industrial Park Sdn Bhd* (foll). (para 29 & 30)

(8) Once the respondent had successfully established its rights *vide* the declaration action, it could sue for damages without impediment. The appellants had agreed not to resort to s. 200(e) of the Sarawak Land Code to defeat the respondent's claim for damages. The respondent's rights would also be protected by art. 13 of the Federal Constitution. Since the respondent's land was valued at RM14m, any litigated damages would be quantifiable. *CCA Holdings Ltd v. Palm Resort Bhd* (foll); *Saw Seng Kee v. Director of Land & Mines, Penang* (foll). (para 31, 32, 33, 34 & 35)

(9) The statutory restrictions in ss. 29(1)(a) and 29(1)(b) of the GPA prevented the court from granting an injunction, ordering the recovery of the land from the appellants or delivery of the land to the respondent. Further, apart from the restrictions, the balance of convenience based on public interest and the sufficiency of damages favoured the non-issuance of the injunction. (para 36)

Bahasa Malaysia *Translation Of Headnotes*

Tanah responden yang dinilaikan sebanyak RM14 juta telah dimasuki semula oleh perayu kedua yang juga telah menyebabkan memorial kemasukan semula di buat ke atas daftar tanah. Tanah tersebut telah kemudiannya disita dan dipindahmilik kepada perayu keempat – Kerajaan Negeri. Responden seterusnya memfailkan writ di Mahkamah Tinggi bagi pengisytiharan relif, antara lainnya, pengisytiharan bahawa kemasukan semula perayu kedua adalah menyalahi undang-undang, tidak sah dan terbatal dan bahawa plaintif dan bukannya perayu keempat adalah berhak tehadap tanah tersebut dan/atau milikannya. Responden juga telah memfailkan permohonan *inter partes* bagi injunksi sementara sambil menanti penyelesaian tindakan untuk menahan perayu ketiga dan keempat dari berurusan dengan tanah tersebut dan bagi menahan perayu pertama dan kedua dari mendaftarkan apa-apa pengurusan berkaitan dengan tanah tersebut. Mahkamah Tinggi telah membenarkan injunksi dan perayu-perayu telah merayu kepada Mahkamah Rayuan. Perayu berhujah bahawa Mahkamah Tinggi telah silap kerana (i) pihak responden tidak pernah meminta perintah injunktif di dalam writ mereka (ii) ss. 2 Akta Prosiding Kerajaan 1956 (APK) dan 54 Akta Relif Spesifik 1950 (ARS) kedua-duanya menghalang injunksi terhadap kerajaan dan jabatan Kerajaan, (iii) perimbangan kemudahan tidak berpihak terhadap membenarkan injunksi; dan (iv) memadai bagi memberi pampasan kepada responden.

Diputuskan (membenarkan rayuan)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Tugas Mahkamah Rayuan hanyalah untuk mengkaji semula keputusan Hakim Mahkamah Tinggi dan mempertimbangkan sama ada beliau telah memakai dengan tepatnya semua prinsip-prinsip yang betul apabila membenarkan injunksi sementara. Ianya tidak terbuka kepada Mahkamah Rayuan untuk

mengganti keputusan Mahkamah Tinggi dengan keputusannya (Mahkamah Rayuan) sendiri, atas dasar bahawa Mahkamah Rayuan akan mencapai pendapat yang berbeza jika diletakkan di kedudukan Mahkamah Tinggi. Jika hakim Mahkamah Tinggi telah melakukan kesilapan undang-undang, salah tanggap terhadap fakta, gagal memberi kepentingan yang cukup terhadap perkara relevan, mengambil kira perkara yang tidak relevan ataupun jika keputusan tersebut akan membawa ketidakadilan maka Mahkamah Rayuan mempunyai tanggungjawab untuk mengenepikan perintah Mahkamah Tinggi. *Vijayalakshmi Devi d/o Nachatiram v. Dr. Mahadevan* (dirujuk); *S & F International Ltd. v Trans-con Engineering Sdn. Bhd.* (diikuti).

(2) Tertakluk kepada batasan-batasan statutori, mahkamah boleh mengeluarkan pengisytiharan dekri berkaitan status atau hak mana-mana orang yang mempunyai hak terhadap mana-mana sifat undang-undang, atau sesuatu harta. Dia berhak untuk memulakan tindakan terhadap mana-mana orang yang menafikan atau berminat untuk menafikan pegangannya terhadap sifat atau hak tersebut, dan mahkanah boleh atas budi bicaranya membuat pengisytiharan bahawa dianya berhak. Perintah Pengisytiharan yang sedemikian adalah terikat keatas pihak-pihak yang relevan terhadap tindakan. Di dalam kes semasa, hakim Mahkamah Tinggi bebas memberi perintah akibat langsung, walaupun bukan perintah pemilikan semula oleh responden. *Lim Cho Hock v. Government of Perak & Ors.* (diikuti).

(3) Walaupun responden tidak memplid relief injunksi sementara di dalam writ, permohonan responden bagi injunksi melalui saman pemula adalah melebar bersama writ. Aturan 29 KMT 1980 cukup luas untuk meliputi situasi berkenaan, walaupun writ membisu tentang permohonan bagi injunksi.

(4) Walaupun Mahkamah Tinggi mempunyai budi bicara untuk memberi injunksi, s. 29 APK tidak membenarkan injunksi dikeluarkan terhadap kerajaan. Bersamaan itu juga s. 54 ARS melarang injunksi terhadap mana-mana jabatan kerajaan Malaysia. Perkataan-perkataan s. 29(1)(a) APK adalah cukup jelas dan tiada sebab untuk menyimpang daripadanya. Di bawah s. 29(1)(b) APK, walaupun mahkamah dilarang membuat perintah untuk pemulihan tanah atau mana-mana

harta, mahkamah boleh membuat perintah mengisytiharkan bahawa plaintif adalah berhak ke atas tanah atau harta tersebut. Oleh yang demikian jikapun plaintif yang terkilan tidak dapat memulih kembali tanahnya, dia tidak semestinya dilucutkan kesemua haknya seperti pampasan. Di dalam kes semasa, memandangkan terdapat larangan statutori, dan memandangkan tiada peluang bagi responden mendapatkan semula hakmilik tanah dari kerajaan, maka tiada sebab mengapa suatu injunksi patut diberi. *Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors* (tidak diikuti); *Tengku Haji Jaafar & Anor v. Government Of The State Of Pahang* (dirujuk); *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* (dibezakan); *Lim Kit Siang v. United Engineers (M) Bhd & Ors* (dirujuk); *Pemungut Hasil Tanah Daerah Barat Daya, Penang v. Kam Gin Paik & Ors* (diikuti); *Evergreen Frontier (M) Sdn Bhd v. The Director of Lands and Surveys (Sabah) & Anor* (diikuti); *Bato Bagi & Ors v. Government Of The State of Sarawak* (diikuti).

(5) Seksyen 54 ARS hanya ditujukan kepada injunksi tetap. Dalam kes semasa, walaupun responden berhujah bahawa injunksi tetap boleh dikeluarkan terhadap kakitangan kerajaan, responden telah gagal mengenalpasti peruntukkan yang relevan. Ianya juga tidak berkemungkinan bahawa responden akan mendapat injunksi tetap memandangkan ia tidak memohonnya terhadap kakitangan kerajaan. Malah jikapun ia berbuat demikian, hanya terdapat kemungkinan yang kecil sahaja ianya akan diberi berdasarkan undang-undang yang berkenaan. Oleh sebab responden tidak boleh mendapat injunksi tetap terhadap kakitangan kerajaan, maka ia juga tidak boleh mendapat injunksi sementara terhadap mereka.

(6) Dalam kes semasa, selain dari larangan statutori di bawah s. 54 ARS, tidak terdapat apa-apa sebab kenapa kerajaan harus dihalang dari melaksanakan tugas harian mereka. Selain dari itu, walaupun injunksi telah diminta oleh responden adalah terhadap jabatan kerajaan dan kakitangan kerajaan, ia sebenarnya adalah sama seperti injunksi terhadap kerajaan dan juga memberi kesan yang sama. Ini melanggari s. 29(2) ARS.

(7) Dalam menaksir imbangan kemudahan dalam applikasi injunksi, mahkamah boleh mempertimbangkan kepentingan awam. Di dalam kes semasa, jabatan kerajaan tidak boleh mengambil mudah bahawa tanah responden yang digali itu merupakan

suatu ancaman awam. Membenarkan jabatan kerajaan dan/atau kakitangannya menjalankan tugas awam mereka tanpa rasa ketakutan terhadap apa-apa gangguan adalah rasional di sebalik peruntukan larangan di dalam APK dan ARS. *Smith v. Inner London Education Authority* (dirujuk); *Tenaga Nasional Berhad v. Dolomite Industrial Park Sdn Bhd* (diikuti).

(8) Sebaik sahaja responden telah membuktikan haknya melalui tindakan deklarasi, ia bebas menyaman untuk gantirugi tanpa halangan. Pihak perayu telah bersetuju untuk tidak menggunakan s. 200(e) Kanun Tanah Sarawak untuk menghapuskan tuntutan gantirugi oleh responden. Hak responden juga akan dilindungi oleh per. 13 Perlembagaan Persekutuan. Oleh sebab tanah responden dinilaikan sebanyak RM14 juta, apa-apa gantirugi yang dilitigasi boleh ditentukan kuantumnya. *CCA Holdings Ltd v. Palm Resort Bhd* (diikuti); *Saw Seng Kee v. Director of Land & Mines, Penang* (diikuti).

(9) Larangan statutori di bawah ss. 29(1)(a) dan 29(1)(b) APK menghalang mahkamah dari memberi injunksi, mengambil semula tanah dari perayu atau menyerahkan tanah kepada responden. Selain dari halangan-halangan, imbangan kemudahan berdasarkan kepentingan awam dan kecukupan gantirugi juga menyebelahi tidak membenarkan injunksi.

Case(s) referred to:

Bato Bagi & Ors v. Government Of The State of Sarawak [2008] 6 CLJ 867 HC ***(foll)***

Bina Satu v. Tan Construction [1988] 2 CLJ 652; [1988] 1 CLJ (Rep) 384 HC ***(refd)***

CCA Holdings Ltd v. Palm Resort Bhd [1998] 4 CLJ 440 HC ***(refd)***

Evergreen Frontier (M) Sdn Bhd v. The Director of Lands and Surveys (Sabah) & Anor [2004] 8 CLJ 156 HC ***(foll)***

Lim Cho Hock v. Government of Perak & Ors [1980] 1 LNS 43 ***(foll)***

Lim Kit Siang v. United Engineers (M) Bhd & Ors [1987] 2 CLJ 195; [1987] CLJ (Rep) 170 SC ***(refd)***

Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Karpal Singh Ram Singh [1992] 1 CLJ 36; [1992] 1 CLJ (Rep) 212 SC ***(refd)***

Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 CA ***(dist)***

Pemungut Hasil Tanah Daerah Barat Daya, Penang v. Kam Gin Paik & Ors [1986] 1 CLJ 283; [1986] CLJ (Rep) 33 PC ***(foll)***

S & F International Ltd v. Trans-con Engineering Sdn Bhd [1985] 2 CLJ 228; [1985] CLJ (Rep) 280 FC ***(foll)***

Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 2 CLJ 122 CA ***(not foll)***

A *Saw Seng Kee v. Director of Lands & Mines, Penang & Ors [1986] 1 LNS 77* ***(refd)***
Smith v. Inner London Education Authority [1978] 1 All ER 411 ***(refd)***
Tan Suan Choo v. Majlis Perbandaran Pulau Pinang [1982] 1 LNS 83 ***(refd)***
B *Tenaga Nasional Berhad v. Dolomite Industrial Park Sdn Bhd [2000] 1 CLJ 695 CA*
Tengku Hj Jaafar & Anor v. Government Of The State Of Pahang [1977] 1 LNS 139 ***(refd)***
Vijayalakshmi Devi Nachatiram v. Dr Nadchatiram & Ors [1995] 3 CLJ 493 ***(refd)***

C
Legislation referred to:
Federal Constitution, art. 13
Government Proceedings Act 1956, ss. 29(1)(a), (b), (2), 33
Land Code (Cap 81) (Sarawak), s. 200(e)
Rules of the High Court 1980, O. 29
D Specific Relief Act 1950, ss. 8(3), 54

For the appellant - Datuk JC Fong; State Attorney General (Saferi Ali with him); State AG's Chambers
For the respondent - Tan Thiam Teck (Paul Tang Ngoong Wee with him); M/s The Law Firm Advocates & Solicitors
E

[Appeal from High Court, Kuching; Suit No: 21-6-08-III]

Reported by Andrew Christopher Simon

F

JUDGMENT

Suriyadi Halim Omar JCA:

G **[1]** The panel allowed this appeal with costs and we had accordingly set aside the *interim* injunction order granted by the High Court on 7 November 2008.

[2] At the outset, it must be clarified that with the High Court order being *interim* in nature, much of our focus was directed on
H such type of injunctions, though touching on some aspect of permanent injunctions against the Government, its departments and servants was inevitable. It is quite established now that we were merely to review the decision of the learned judge and conclude whether he had correctly applied all the right principles
I when meting down the *interim* injunction. It is not incumbent upon us to substitute his decision premised on the ground that we would have arrived at a different finding, had we been in his

shoes, subject to him having correctly adhered to all the established legal principles. If either he has committed an error in law, misconceived the facts, not giving sufficient weight to relevant matters but taking into account irrelevant ones or the decision would result in injustice, it then becomes incumbent upon us to set that order aside (*Vijayalakshmi Devi Nachatiram v. Dr Mahadevan Nadchatiram & Ors* [1995] 3 CLJ 493). In *S & F International Ltd. v. Trans-con Engineering Sdn Bhd* [1985] 2 CLJ 228; [1985] CLJ (Rep) 280 the Federal Court had occasion to state:

> We should perhaps also reiterate and stress the point that the discretion whether or not to grant an interlocutory injunction is vested in the High Court judge and not the appellate court whose function initially is one of review only, and it will not overrule the decision of the judge at first instance unless, broadly speaking, he has made an error of law or misconceived the facts, and except in those circumstances it must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently ...

[3] We now supply the reasons why we allowed the appeal. The appellants had supplied four main grounds for our consideration, *viz*. the court had granted an *interim* injunction even though:

i. that injunctive relief was never sought out in the writ;

ii. section 29 of the Government Proceedings Act 1956 (GPA) and s. 54 of the Specific Relief Act 1950 (SRA), do not permit the granting of any injunction against the government and government departments respectively;

iii. the balance of convenience did not favour the granting of such an order; and

iv. damages were adequate to compensate the respondent in the event it wins the main suit.

[4] But first we reproduce the salient facts of the matter before us. The respondent purchased the impugned land (hereinafter referred to as the land) in 1988 at a purchase price of RM3,500,000, and as pleaded, it has a current estimated value of RM14,000,000. It then became the registered owner of it. The respondent subsequently obtained approval for the erection of

A buildings on the land from Dewan Bandaraya Kuching Utara (DBKU), subject to the terms and conditions listed in the letter of approval. Due to stoppages in the construction works and with the site being deeply excavated it became a danger to the adjoining land and public at large. The approved building plan
B subsequently lapsed. Due to the non-compliance of that building plan, what with the existence of danger to the adjoining land and the public, after statutory notices had been served on the respondent, the appellants re-entered and forfeited the land on 13 February 2006. A certificate of re-entry dated 13 February
C 2006 was gazetted by the Sarawak Government and a memorial of the re-entry was noted on the land Registry to legalise that repossession.

[5] A respite of relief against the forfeiture over the land was
D granted but subject to certain terms and conditions, amongst them that the plan for the development of the land be approved by the State Planning Authorities, and a sum of RM12,759,941 be deposited by the respondent with DBKU as security. Despite agreeing to that relief, the respondent failed to satisfy those
E conditions thus leaving the land forfeited to the Government, which now has reverted to the State.

[6] Being dissatisfied the respondent filed a writ seeking a declaration or declaratory order, *inter alia* that:

F i. the purported re-entry was unlawful, invalid, null and void;

ii. the re-entry be set aside;

iii. the memorial be declared null and void;

G iv. the certificate of re-entry be declared null and void;

v. the respondent was still the legal and beneficial owner;

vi. the respondent was entitled to the land as against the fourth
H appellant; and

vii. damages.

[7] Subject to certain statutory curtailment, a court may issue declaratory decrees pertaining to the status or right of any person
I entitled to any legal character, or to any right as to any property. He is entitled to institute a suit against any person denying, or interested to deny, his title to the character or right, and the court

may in its discretion make therein a declaration that he is so entitled. Such a declaratory order would be binding on the relevant parties to the suit. In *Lim Cho Hock v. Government of Perak & Ors* [1980] 1 LNS 43, Abdoolcader J (as he then was) said on the jurisdiction to grant declaration said:

> The jurisdiction to grant declaration is extremely wide. Lord Sternadle MR, said in *Hanson v. Radcliffe Urban District Council* (at p. 507): "The power of the Court to make a declaration ... is now almost unlimited. I might say only limited by its own discretion." And this was affirmed by the Privy Council in *Ibeneweka v. Egbuna* ...

[8] It was our view that even if success were to be on the side of the respondent, though impeded by certain statutory restrictions, the presiding learned judge may have to make certain consequential orders, but certainly not repossession by the respondent. But more of this later.

[9] I now touch on the pleading's matter first ie, the 'preliminary' issue in the appeal. The appellants had ventilated that the *interim* injunctive relief was never sought for in the writ but yet granted. To resolve this issue we need only to scrutinize O. 29 of the Rules of High Court 1980 (RHC 1980). It reads:

> Order 29
>
> Interlocutory Injunctons, Interim Preservation Of Property, ETC
>
> 1 Application for injunction (O. 29 r. 1)
>
> (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, **whether or not a claim for the injunction was included in that party's writ**, originating summons, counterclaim or third notice, as the case may be (emphasis added).

[10] The respondent here had applied for an injunction in the originating summons, a prayer that was co-extensive to the writ filed earlier by the respondent. With O. 29 of the RHC 1980 wide enough to cover the current situation, even though the writ was silent as to the injunction prayer and despite a subsequent amendment, we held the view that this first ground of the appellant must fail.

[11] The second ground is substantive in nature as it relates to the actual jurisdiction of granting the injunction. Even though the High Court has the discretion to grant it, s. 29 of the GPA does not permit the granting of any injunction against the government, and likewise s. 54 of the Specific Relief Act has the same bar for any department of any Government in Malaysia. Section 29 of the GPA stipulates:

29. Nature of relief

(1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that:

(a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may *in lieu* thereof make an order declaratory of the rights of the parties; and

(b) in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may *in lieu* thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof.

[12] Section 54 of the SRA 1950 reads:

54. Injunction when refused

An injunction cannot be granted:

(a) ...

(b) ...

(c) ...

(d) to interfere with the public duties of any department of any Government in Malaysia, or with the sovereign acts of a foreign Government;

[13] As regards s. 29(1)(a) of the GPA, the respondent have adduced local precedents to deal with the latter, and learned counsel for the respondent have come out strongly that courts are now quite inclined to grant *interim* injunctions against the Government, despite the statutory inhibitions. The respondent conceded that it was barred from obtaining a permanent injunction against the Government under the above provision though one could be granted against government servants.

[14] In support of its stance the respondent had referred to *Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 2 CLJ 122. The head notes pertaining to the facts of the case are as follows. The appellant, a private limited company, carried on the business of a canteen operator at the first respondent's government hospital. The appellant's case was that in reliance of the assurance of the first respondent, it borrowed money and incurred expenses for the canteen but the first respondent had instead resiled from its assurance by terminating the contract. The first respondent subsequently granted the contract for operating the canteen to the fourth respondent. The appellant complained that the first respondent acted in breach of contract and constructive trust. It applied for an urgent injunction against the first and fourth respondents from evicting it from the canteen premises of the first respondent but dismissed by the judicial commissioner. The sole ground relied upon by the latter was that the court had no jurisdiction to grant the injunction. Two issues had to be resolved by the court *viz*. whether, in view of the provisions of s. 29 of the GPA, the High Court had jurisdiction to grant the injunction sought; and whether the facts entitled the appellant to an injunction in the exercise of the court's discretion. The appeal was dismissed but in the course of it the Court of Appeal had occasion to state that the courts have jurisdiction to grant *interim* and permanent injunctions against any servant of the Government. At pp. 133-134, the court had remarked:

> ... In our judgment, the effect of current authority is that our courts have jurisdiction to grant *interim* and permanent injunctions against any servant of the Government. Accordingly, there was no jurisdictional bar to the High Court granting the instant appellant the injunction it sought against the first respondent, the Director of the hospital in question. Since a Government servant or a member of the Cabinet may be restrained by injunction, it is strictly unnecessary from a practical point of view to decide whether the Government itself may be restrained in appropriate

A circumstances. Nevertheless, since the question is one which was argued before and ruled upon by the learned judicial commissioner, we think it behoves us to deal with the point. We accordingly proceed to consider the position of the second and third respondents, namely, the Ministry of Health and the
B Government of Malaysia.

It has been settled since at least 1978 that s. 29 of the 1956 Act does not prohibit the grant of temporary injunctions against the Government. In Tengku Haji Jaafar & Anor v. Government of the State of Pahang [1978] 2 MLJ 105 it was held that the section 'does not take away
C *therefore the right of the court to grant an interlocutory injunction'.* This court in *Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1 treated the ratio in *Tengku Haji Jaafar & Anor v. Government of the State of Pahang* [1978] 2 MLJ 105 as settled law. Although the Federal Court reversed our decision in that case on the constitutional point, our judgment on this point was
D approved sub silentio. Accordingly, **it is too late in the day to argue that s. 29 bars the grant of an interlocutory or even an *interim* injunction against the Government** (emphasis added).

[15] In the abovementioned *Tengku Haji Jaafar & Anor v.*
E *Government Of The State Of Pahang* [1977] 1 LNS 139, the applicants had applied for an *interim* injunction to restrain the respondent from dealing with the property, the subject of the civil suit between the applicants and the respondent. The plaintiff-applicants claimed that the land was a gift to the plaintiff from the
F first Sultan of Pahang many years ago. The State Government disputed the claim. The applicants alleged that the State Government was likely to proceed with the alienation of certain portion of the land for development by way of lease, licence or outright alienation despite current proceedings in court and had
G disposed certain portions to various bodies without the consent of the applicants thus causing loss to the latter. The application was dismissed as greater hardship and inconvenience would be caused to the respondent than the applicants if the injunction was issued at that stage as Government endeavours would be put to a halt
H in a vast territory of land where the question was yet to be determined as to whether the plaintiff would succeed at the trial or not.

[16] The learned judged said:

I It seems to me from the foregoing that the strict and just application of section 29(1) of the Government Proceedings Ordinance would necessarily require, therefore, that an interlocutory injunction must lie against the Government if only to

give effect to the provision that a declaratory order only may be made against the Government since without an *interim* injunction the Government would be free to act to effect if necessary the ultimate destruction of the subject matter of the declaration and thus render the purport and effect of the section nugatory and useless. It is said that no injunction at all could be issued against the Government because the section says so. But it is also said by the section that such relief may be had against the Crown as may be given as between subject. Thus said, in my view in order to achieve a proper balance as between the right of the individual to obtain relief against the Crown and the right of the Crown to limit that relief to merely getting a declaratory order, an *interim* injunction becomes necessary only in order to preserve the *status quo* of the parties pending the declaration otherwise the whole object of the section is *ab initio* defeated.

[17] In support of its position, and in the course of the appeal the current respondent had alluded to a portion of Arifin Zakaria FCJ's (as he then was) statement in *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321, which reads at p. 347:

In *Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 2 CLJ 122, the Court of Appeal at p. 131 stated:

…

In that case the Court of Appeal held, *inter alia*, that the courts have jurisdiction to grant *interim* and permanent injunctions against any servant of the government. It also held that it is too late in the day to argue that s. 29 of the GPA bars the grant of an interlocutory or even an *interim* injunction against the government. *That is not the issue before us, as such I would not venture to say anything more on this save that the courts have moved away from the traditional stand that no order of injunction may be granted against the government.*

The position now is that the courts in the Commonwealth, Malaysia including, have moved away from the traditionalist approach that the Crown can do no wrong (emphasis added).

[18] In the above Federal Court case, the facts are that the respondent after obtaining a monetary judgment against the State Government of Sabah, successfully obtained a certificate of judgment sum and order for costs pursuant to s. 33(1) of the GPA. The latter made no payment pursuant to that certificate. The matter eventually landed at the Federal Court and leave to

A appeal was on a single issue of law, which was whether judicial proceedings could be undertaken against the Government to compel payment of a judgment sum certified in the certificate issued under the said s. 33 (1). At the end of the hearing the appeal was dismissed with costs. The court stated that once a B certificate was issued under s. 33(1) of the GPA the State Government was under an obligation to make the necessary payment.

[19] We have italicized the relevant portion of the learned judge's C remark, as in our considered view that remark is obiter in nature, with his views merely targeting the tendencies of courts in certain situations. Certainly we accede to the view that Malaysia has moved away from the traditionalist approach that the Crown can do no wrong. Undeniably at no time was the issuance of an D injunction under discussion there unlike that of this appeal where the facts and legal issues are easily distinguishable.

[20] Needless to say the words of s. 29(1)(a) of the GPA are quite clear and there is no reason to depart or whittle away what has been built into it. In E *Lim Kit Siang v. United Engineers (M) Bhd & Ors* [1987] 2 CLJ 195; [1987] CLJ (Rep) 170, the Supreme Court affirmed the view of the High Court judge as regards the express prohibition in s. 29, though not the extension of its scope. It was unable though to agree that the provision prevents the F granting of an injunction against a party (UEM there) having a transaction with the government.

[21] Apart from the clarity of s. 29(1)(a) of the GPA this panel was also confronted by the prohibition of the issuance of an injunction against any Government departments (s. 54 SRA), as G opposed to a s. 33 certificate of the GPA in the above case, where a court is not prevented from assisting an aggrieved party. Most pertinently, the injunction applied for by the respondent here does not merely revolve around an injunction *per se* against the government, say on some administrative issue, but connected to H land that has been reacquired by the Government, and recovery of which is statutorily precluded. In a gist, there exist at least two substantive prohibitions in this appeal.

[22] The preclusion provision is s. 29(1)(b) of the GPA (see also I s. 8(3) of the SRA) and it provides that, "in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of land or the

delivery of the property ..." though *in lieu* it may make an order declaring that the plaintiff is entitled as against the Government to the land or property. The Privy Council at p. 291 (p. 39) in *Pemungut Hasil Tanah Daerah Barat Daya, Penang v. Kam Gin Paik & Ors* [1986] 1 CLJ 283; ([1986] CLJ (Rep) 33) applied the law when it held as follows:

> However, their Lordships agree with the Federal Court that section 29(1)(b) of the Government Proceedings Ordinance 1956 precludes an order being made against the Government, whose servant the appellant is, for the recovery of the land. So the Federal Court rightly set aside that part of the order of the learned trial judge which ordered the appellant to deliver possession of the lands back to the respondents.

[23] In *Evergreen Frontier (M) Sdn Bhd v. The Director of Lands and Surveys (Sabah) & Anor* [2004] 8 CLJ 156 the learned judge refused to mete out an order that smacks of specific performance against the government as it runs afoul of the above s. 29 GPA, and had substituted the unfairness of the defendant by damages to be assessed. Therefore, implicitly an aggrieved person, though unable to recover the land or have it delivered to him is not deprived of certain entitlement, say compensation, though with some help from the court.

[24] In *Bato Bagi & Ors v. Government Of The State of Sarawak* [2008] 6 CLJ 867, a declaration was sought as to whether the Government or its servants/agents could be ordered to vacate the land claimed, an order that tantamount to ordering the government to deliver vacant possession of that land. Also in relation to s. 29(1)(b) GPA, the learned judge said:

> Thus any order made contrary to the abovementioned provision is liable to be struck down or set aside on appeal ...
>
> Counsel for the defendant submitted that an order for the defendant or its servants or agents to vacate the land in question would tantamount to the defendant delivering vacant possession thereof to the plaintiffs and thus would offend s. 29(1)(b) of the Government Proceedings Act 1956. I agree ...

[25] With the presence of the above prevailing statutory prohibition, there was thus no prospect of the respondent recovering possession of the land from the Government. With preclusion of the right of recovery of the land in this appeal, and tacitly admitted by the respondent before us, we saw no logical reason why an injunction (the prohibition of s. 29(1)(a) of the GPA aside), should have been granted at all.

[26] On the other hand, if a permanent injunction cannot be granted against the Government (and even conceded by the respondent), can the court order an *interim* injunction against any government department under s. 54 of the SRA? Authorities show that this provision is meant for permanent injunctions (*Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* [1982] 1 LNS 83; *Bina Satu v. Tan Construction* [1988] 2 CLJ 652; [1988] 1 CLJ (Rep) 384). Before responding to the above question, we need to state at the outset that the respondent agreed that it is barred from obtaining a permanent injunction against the Government under s. 29 of the GPA. On the other hand, even though it ventilated that a permanent injunction could be obtained against a government servant, it failed to identify the provision for that proposition, and instead cited the case of *Sabil Mulia (supra)* as its authority.

[27] In *Saw Seng Kee v. Director of Lands & Mines, Penang & Ors* [1986] 1 LNS 77, it was held that a public authority should not be restrained by interlocutory injunction from exercising its statutory powers unless the applicant has shown a real prospect of success in his claim for a permanent injunction at the final hearing. In this current appeal, it was improbable that a permanent injunction could have been obtained by the respondent as at no time did it apply for a permanent injunction against government servants; and even if it did, with the law as it stood the probability was slim. With such a scenario how then could an *interim* injunction be granted?

[28] Apart from the distinctive statutory prohibition of s. 54 of the SRA, there was no reasonable excuse why government departments here should be prevented from carrying out their daily responsibilities, especially when adjoining properties were facing water seepages from the excavated area, let alone danger to the public had now become a serious issue as admitted by the respondent. How is the relevant department ever going to carry out its duties if its employees are injuncted? It is obvious in this case that although injunctions were also sought against Government departments and Government servants, in substance and effect, those injunctions were actually against the Government, a scenario that is also adequately covered by s. 29(2) of the GPA, and it reads:

(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

[29] When courts are faced with injunction applications, the factor of balance of convenience has to be considered in the course of their deliberation, and when assessing where the balance of convenience lies, the interest of the public may rightly be taken into consideration (*Smith v. Inner London Education Authority* [1978] 1 All ER 411). No Government departments can afford to take lightly any admission that the excavated area had posed a threat to the public. As Gopal Sri Ram JCA (as he then was) delivering the judgment of the Court of Appeal in *Tenaga Nasional Berhad v. Dolomite Industrial Park Sdn Bhd* [2000] 1 CLJ 695 said:

> ... I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed.

[30] To wind up all the above prohibitive provisions, the rationale of allowing the Government, any government department or government servants to carry out its duties to the public, and without fear of any unnecessary impediment, must be one of the many obvious reasons why the GPA and the SRA have been so legislated in that manner.

[31] As regards the grievances of the respondent, we were of the view that, once the rights have been successfully established *vide* the declaration action, there was no impediment for the respondent to sue for damages. Indeed, we were initially perturbed by the near improbability of the respondent successfully obtaining damages from the government, due to the promulgation of s. 200, especially para. (e) of the Sarawak Land Code, despite a successful declaratory action. This relevant provision reads:

Government not liable in certain cases

200. Notwithstanding that effect may have been given to the same by entry on the Register, the Government shall not under any circumstances be liable for compensation for any loss, damage or deprivation occasioned by any of the following things:

A (a) ...

(b) ...

(c) ...

B (d) ...

(e) by the improper exercise of any power of sale or re-entry;

[32] Simply put the respondent had canvassed that, due to the way the words have been couched, it would be left without any C remedy at all, as the law had unwittingly plugged every possible avenue. In such a scenario, unless the court comes to its rescue and ensure *status quo*, in order for any declaratory order to have meaning, injustice may be the end result. The case of *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Karpal Singh Ram Singh* D [1992] 1 CLJ 36; [1992] 1 CLJ (Rep) 212 was canvassed to us by the respondent to clarify the matter. In this case, Karpal Singh had sought a declaration pertaining to the validity of an order of detention under the Internal Security Act 1960 against him, and also the restrictions and conditions imposed on him. The E originating summons was taken out after the detention order was suspended but before the detention order was cancelled. However when the originating summons came before the learned judge the detention order was already cancelled. The court opined that as the matter had become academic, and the respondent having no F real interest in the declarations, it would not act in vain.

[33] The above situation was what was feared by the respondent in the current appeal. It ventilated that an *interim* injunction was necessary in order to avoid a pending declaratory order from being G reduced to mere paper, as forces were at work to have the property transferred and registered to a third party. Once that happens it would be quite impossible for any court to order the undoing of any registration of the immoveable property or bring matters back to square one.

H **[34]** Our fears were allayed when the appellants conceded that they would never allude and advocate s. 200(e) in order to defeat the respondent's case for damages. We were not unmindful that art. 13 of the Federal Constitution would protect the rights of the respondent in any suit for damages against the Sarawak I government; with such assurances any fear of the respondent being deprived of compensation in any future proceedings had

been dispelled. Given that the property is valued currently at RM14,000,000 as asserted by the respondent in its pleadings, this panel certainly was satisfied that any litigated damages were quantifiable. To wrap up this issue permit us to reproduce the words of James Foong J (as he then was) in *CCA Holdings Ltd v. Palm Resort Bhd* [1998] 4 CLJ 440 at 445 when he said:

> If damages in the measure recoverable at common law be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.

[35] In *Saw Seng Kee v. Director of Land & Mines, Penang & Ors* [1986] 1 LNS 77 Edgar Joseph Jr J (as he then was) held:

> The very first principle of law, said Lindley LJ in *London Blackwall Railway Co. Cross*, (2):
>
> > ... is that *prima facie* you do not obtain an injunction to restrain actionable rights in which damages are the proper remedy.
>
> In the *Cynamid* case, Lord Diplock made the same point at p. 408 B & C in the following terms:
>
> > The court should first consider whether, if the plaintiff were to succeed at the trial in establishing its right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendants continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages ... would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at the stage.

[36] As we were satisfied that:

i. the combined effect of the hurdle of s. 29(1)(a) of the GPA, in that no injunction may be ordered against the Government, and the preclusion of s. 29(1)(b) of the GPA whereby courts cannot order the recovery of the land from the Government or the delivery of property to the respondent had not been overcome; or

A ii. the balance of convenience founded on public interest or sufficiency of damages favoured the non-issuance of an injunction, regardless of the above statutory inhibitions,

[37] we accordingly meted down the consequential orders. To
B reiterate, apart from allowing the appeal as stated in the opening paragraph of this grounds of judgment, we thereupon ordered that the *interim* injunction be set aside, costs ordered for here and below, and that the deposit refunded to the appellants.

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